Order under Sections 30 and 31
Residential Tenancies Act, 2006

Citation: O'Grady v 6891799 Canada Inc., 2023 ONLTB 25933
Date: 2023-03-16
File Numbers: LTB-T-074597-22 (formerly SOT-15435-20)
LTB-T-074685-22 (formerly SOT-16695-20)

In the matter of: 1387 COLBORNE STREET E
BRANTFORD ON N3T5M1

Between: Garrison O'Grady — Tenants
John O'Grady
Allana Simmons

and

6891799 Canada Inc. — Landlord

The file numbers of these applications have been changed as a result of migration of the files to the Tribunals Ontario Portal.

In the application LTB-T-074597-22 (formerly SOT-15435-20), Garrison O'Grady, John O'Grady and Allana Simmons (the 'Tenants') applied for an order determining that 6891799 Canada Inc. (the 'Landlord') failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards (the “T6 Application”).

In the application LTB-T-074685-22 (formerly SOT-16695-20), the Tenants applied for an order determining that the Landlord:

- substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household;
- harassed, obstructed, coerced, threatened or interfered with them; and,
- withheld or deliberately interfered with the reasonable supply of a vital service, care service, or food that the Landlord is obligated to supply under the tenancy agreement (the “T2 Application”).

This applications were heard by videoconference on April 28, 2022 and June 27, 2022.

The Tenants, John O’Grady and Allana Simmons, and the Landlord’s instructing client, Mehar Ahmed, attended the hearings. The Tenants were represented by Carmen Dawdy, the Landlord by Sibthey Hasnain. Gregory Bergeron provided testimony for the Tenants.

Determinations:

The Tenancy

1. The tenancy that forms the subject matter of this application commenced on March 1, 2020. The residential complex comprises a motel, trading as the Plaza Motel, and the rental unit is a house that is annexed to the motel. The Tenants previously lived in a separate rental unit within the residential complex. In earlier procedural history, the question of whether the rental unit is exempt from the *Residential Tenancies Act, 2006* (the "Act") by virtue of s. 5(a) was addressed by an A1 application, and by order SOT16853-20 issued by Member Rozehnal on October 29, 2020, the Board determined that the rental unit was not exempt. The Landlord's representative indicated during these proceedings that he believes the decision was made in error, however the Board's files show no record of a review or appeal of the order of October 29, 2020. I must consider that the principle of *res judicata* applies and the rental unit is subject to the Act.

2. There is no written lease. Order SOT-16853-20 determined that the monthly rent was $1,500.00. The same determination was also made in an L1 application assigned the Board's file number SOL-18270-20, in both a hearing order issued on February 1, 2022 and a review order issued on April 12, 2022. In hearing this application, the Landlord's representative claimed that an additional $200.00 flat fee per month was payable for utilities. As the abatements sought by the Tenants are calculated based on a proportion of $1,500.00 monthly rent, I do not consider it material to the applications before me to determine whether these amounts are considered rent.

3. In the course of the hearing, the Landlord's representative also introduced the theory that the absence of a written lease might suggest that the Tenants were in fact trespassing and had no valid tenancy agreement. No evidence to suggest a trespass or unauthorized occupancy was introduced, and in any event the Landlord has previously brought an L1 application, which can only be brought when there is a breach in a tenant's covenant to pay rent under a tenancy agreement. As the Landlord has previously attorned to the Board's jurisdiction in bringing an application that requires the existence of a tenancy agreement, it would in my view be an abuse of process for the Landlord's representative to disclaim the existence of a tenancy agreement in a parallel or future proceeding.

Payment into Trust and History of Rent Payments

4. The Tenants have paid $2,780.00 to the Board in trust since the application was filed. The funds were paid without authorization or direction by the Board. While the current state of rent is not material to either a T2 or T6 application, I do note that it was uncontested that rent had not to the date of the final hearing otherwise been paid for some time. At the hearing of SOL-18270-20-RV on April 1, 2022, the parties agreed that the arrears stood at $28,406.00. At the final hearing, it was uncontested that no rent had

been paid since the April 1, 2022 review hearing. The Landlord's previous L1 application was dismissed in its entirety by order SOL-18270-20-RV issued on April 12, 2022, for reasons outlined in that order arising from the Landlord's non-compliance with subsection 83(3) of the Act.

5. The Landlord and Tenants disagree on the effect of the dismissal of the Landlord's L1 application on the unpaid rent prior to that date. The impact of this disagreement is not material to the applications in themselves, although the incidental factual background is necessary to contextualize part of the defence put forward by the Landlord. It will also be spoken to in terms of how the remedy has been structured. Nothing in this order should be taken as an express determination on the current state of arrears, as that matter is properly determined in an arrears application.

Amendments to applications

6. Amended applications submitted after a case management hearing on November 25, 2020 were accepted at the first hearing.

7. As filed, the respondent was named as 6891799 Ontario Inc. At the hearings, the Tenants requested that the respondent be amended to 6891799 Canada Inc.. The Landlord objected citing unspecified prejudice. As the Landlord at all times had actual notice of the application, I see no procedural prejudice to the Landlord in amending what was a clear clerical error. The amendment was accepted.

T6 Application

8. The T6 Application, filed on June 23, 2020, alleged numerous maintenance issues which the Tenants believe breach the Landlord's obligations under subsection 20(1) of the Act:

> 20 (1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

9. In assessing whether the Landlord has discharged its statutory obligations under subsection 20(1), I must consider the reasonableness of the Landlord's response to a maintenance obligation, once they knew or ought to have known of the issue.

Initial reporting of Maintenance Issues

10. The Tenants allege that the rental unit was in a state of disrepair when the tenancy commenced on March 1, 2020, and that they verbally advised the Landlord of these issues immediately. On March 24, 2020, the Tenant provided the Landlord with a twopage letter (the "March 24 Letter") enumerating maintenance and other concerns with the unit and residential complex, expressly noting that the issues were previously raised

"multiple times through verbal communication."

11. The Landlord concedes receiving the March 24 Letter, but takes the position that the rental unit was in "pretty good" condition on move-in. The Landlord alleged, without any corroborating evidence of either the state of the property on move-in or specific allegations of subsequent damage, that the Tenants caused some of the damage.

12. With the passage of time and fading of memories, it is in my view neither practical, nor (given the shortness of time between the commencement of the tenancy and the March 24 Letter) productive to try to ascertain the precise dates that each issue contained in the letter was brought to the Landlord's attention. While some were doubtless within the Landlord's knowledge prior to that date, I find that the Landlord was on notice of the issues raised in the March 24 Letter not later than March 24, 2020. The difference of 24 days is, after the passage of this much time, effectively a rounding error.

13. The contents of the March 24 Letter and the issues raised in the T6 application are not identical, as the March 24 Letter raises numerous concerns not addressed in the application. Only the complaints expressly raised in the application are properly considered by me in assessing the Landlord's compliance with maintenance obligations. I will not enumerate the complaints in the March 24 Letter here, but instead indicate whether they were contained in the letter in an item-by-item analysis of the complaints.

14. I note that I must expressly reject the insinuation of the Landlord's representative that an adverse inference ought to be drawn from the Tenants' failure to raise certain issues on the T6 application that were noted in the March 24 Letter, including those about alleged illicit or illegal activities taking place in or about the residential complex. An applicant is free to frame their application as they see fit, and are not obliged to raise every grievance they face. The act of self-triage in confining an application to narrow and articulate issues is not unwelcome by those on both sides of the bench.

Other Evidence and Independent Reports

15. A summary of the evidence provided in support of disrepair is appropriate to simplify the analysis of individual allegations of maintenance deficiencies.

16. The 2020 Order: A Property Standards order dated October 16, 2020 was issued by Gregory Bergeron (the "2020 Order"), who provided testimony for the Tenants. The order found deficiencies relating to plumbing and the disconnection of utilities (the latter being more fully described in relation to the T2 Application), and gave an October 31, 2020 compliance date. The deficiencies found in this order were not generally germane to the T6 Application, but this order is noted given the arguments made by the Landlord in relation to differences between the 2020 Order and a subsequent Property Standards Order.

17. The 2021 Order: A further Property Standards Order was issued by Mr. Bergeron on September 3, 2021(the "2021 Order"). This order contained numerous deficiencies relating to the maintenance of residential complex, with some specifically mentioning the rental unit. Those that relate to the allegations in the maintenance application are referenced below.

18. Tenants' disclosure and exhibits: The Tenants' also provided numerous photographs which Mr. O'Grady introduced as exhibits at the hearings. The disclosure of these exhibits was made to the Board on December 23, 2020, well before the hearing. Mr. O'Grady testified that these photographs were taken throughout 2020. These photographs show the state of the unit relatively soon after move-in.

19. One of the arguments put forward by the Landlord was that the maintenance issues contained in the 2021 Order may not have existed at the time of the 2020 order, and only came into existence later. This is an argument that I must reject. I note that the photographs relied upon by the Tenants were disclosed to the Board in late-2020. Mr. Bergeron further testified that the 2020 Order was initiated by the disconnection of vital services, therefore the 2020 Order was not preceded by a broader search for systemic maintenance issues. The breadth and depth of the photographic evidence, created in 2020, coupled with it largely corroborating the complaints in the March 24 Letter, forces me to conclude the Landlord's argument that defects did not exist in 2020 as being without foundation.

Maintenance Issues

20. My analysis of maintenance issues enumerated in the application are as follows. Other allegations of deficient maintenance not included in the application but raised at the hearing, including claims of a deficient hot water heater, were not properly before me, and therefore not addressed in the following section.

21. Unless otherwise indicated below, in all instances of a complaint made in the March 24 Letter, Mr. O'Grady testified that there has been no remedial action taken by the Landlord since the letter was delivered on March 24, 2020.

22. Other than the septic system, the Landlord denied the maintenance issues alleged below by the Tenants. Furthermore, unless otherwise indicated below, the Landlord presented no corroborating evidence to this bald statement to suggest either that the premises was in a good state of repair, or that the Landlord had in fact taken any remedial action on these specific allegations. The Landlord specifically alleged that any damage to windows and locks were caused by the Tenants but provided no corroborating evidence (such as pre-move-in photographs or corroborating witness testimony) to substantiate these allegations. The lack of comment about the Landlord's evidence in much of the discussion below is therefore not to be taken as ignoring the Landlord's testimony, but rather only those points not adequately dispensed with by this preamble are inserted into the discussion that follows.

23. Second Floor hallway: The upstairs hallway was stated to have unfinished, uneven floorboards, with protruding nails that risk minor injuries. This complaint was contained in the March 24 Letter, and Mr. O'Grady introduced a photograph (Tenants 24) to support his allegations. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the second-floor hallway is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had minimal but non-trivial impact on the Tenants' use and enjoyment of the rental unit.

24. Bathroom: The application alleged the upstairs bathroom is in a poor state of repair, having a damaged and leaking bathtub, malfunctioning shower, broken and uneven floor tiles. Mr. O'Grady noted in his testimony that the sink does not function and in two years had not been able to brush his teeth. Mr. O'Grady further testified that there was no showerhead at the time of move-in, and that even after installing one on his own initiative he indicated that the shower was barely functional. This complaint was contained in the March 24 Letter, and has not been remedied by the Landlord. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the bathroom is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had some impact on the Tenants' enjoyment of the rental unit. A functioning bathroom is essential to the utility of a rental unit, and its impaired function has had an adverse impact on the Tenants.

25. Second floor bedrooms The application alleged faulty windows in three bedrooms. Mr. O'Grady testified, supported by photographic evidence (Tenants 26) that the clips holding glass had been removed, causing windows to wobble. In addition, flashing had separated from windows allowing wasps to nest and enter building (Tenants 27), interfering with their enjoyment of the rental unit. This complaint was contained in the March 24 Letter, and the 2021 Order noted (item 8) that, in relation to all units, windows were in a state of disrepair, lacking screens and essential hardware. Mr. O'Grady testified at the hearings that these defects had not been remedied. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the second-floor windows is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had some impact on the Tenants' enjoyment of the rental unit.

26. Staircase: The application alleged that the staircase to second floor is in disrepair, with broken and damaged steps. Mr. O'Grady testified that the state represents a tripping hazard, and that he has injured himself on the stairs in the past. This complaint was contained in the March 24 Letter, and the 2021 Order specifically noted (item 7) that the stairs were in violation of building standards by-laws. A photograph of the stairs introduced by Mr. O'Grady (Tenants 5) showed that the stairs were in a state of poor repair. In addition, the 2021 Order cited deficiencies relating to the stairs. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the staircase is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had some impact on the Tenants' enjoyment of the rental unit, including personal injury.

27. Main floor windows: The Tenants alleged that the main floor windows were defective and needed to be replaced or repaired. Photographs were introduced as evidence (Tenants 2 and 3) showing that a screen on one window was held in place with duct tape. Mr. O'Grady testified that the poor state of repair allows insects and other pests to enter the rental unit. This complaint was contained in the March 24 Letter, and the 2021 Order noted (item 8) that, in relation to all units, windows were in a state of disrepair, lacking screens and essential hardware. Mr. O'Grady testified at the hearings that these outstanding issues has not been remedied. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the main-floor windows is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had some impact on the Tenants' enjoyment of the rental unit.

28. Main floor flooring: Mr. O'Grady testified that the flooring in the kitchen area has cracked tiles that are sharp and can cause injury. This allegation was supported by photographic evidence (Tenants 15). This complaint was contained in the March 24 Letter, and has not been remedied. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the main-floor kitchen flooring is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had minimal but non-trivial impact on the Tenants' enjoyment of the rental unit.

29. Kitchen drywall: The application alleged that the kitchen drywall has been damaged by moisture and mould. Mr. O'Grady presented testimony of moisture damage to drywall above the washroom door (supported by a photograph introduced as Tenants' 23), and a hole in the kitchen wall, which Mr. O'Grady testified allows rodents into the rental unit (supported by a photograph introduced as Tenants 17). This complaint was contained in the March 24 Letter, and Mr. O'Grady testified that the defects had not been repaired. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the kitchen is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had some impact on the Tenants' use and enjoyment of the rental unit.

30. Basement – The application alleged that the basement required mould abatement. This complaint was contained in the March 24 Letter. Mr. O'Grady's testimony on this point was supported by a single photograph of the alleged mould (Tenants 11). I do not consider that the Tenants have proven that the substance is mould, therefore cannot find the Landlord has breached maintenance obligations under section 20 of the Act on this point.

31. Electrical panel: The application complained that an electrical panel was exposed and close to leaking water. This complaint was contained in the March 24 Letter, although Mr. O'Grady's evidence at the hearing was little more than referencing a photograph (Tenants' 25) and stating that it does not look very safe. I do not consider that there was any substantive proof of a failure of the Landlord to meet its statutory maintenance standards based solely on a tenant's speculation.

32. Locks: The application alleged that the front door of the house has a broken lock and latch. This complaint was contained in the March 24 Letter. Mr. O'Grady, testified, supported by photographic evidence (Tenants 10) that the defect prevented securing the rental unit. Mr. Bergeron indicated in his testimony that some of the locks in the residential complex were replaced subsequent to the 2021 Order. Mr. O'Grady testified that the lock remained at the time of the hearing in the same state as shown in his photographic exhibit. As I find his testimony generally credible, I accept his statement as credible that the lock has not been repaired. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the unit's door lock is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had some impact on the Tenants' use and enjoyment of the rental unit.
33. Malfunctioning septic system – This complaint was contained in the March 24 Letter, and it was noted in that letter that the septic system was at that time already subject to an order from Brant County. In consequence of a malfunctioning septic system, sewage enters the basement through sumps, which Mr. O'Grady testified creates a persistent, foul smell. Photographs of the yard (Tenants 6 and 7) were presented, which Mr. O'Grady testified show sewage at ground level that is not properly absorbed by the ground. The disrepair of the septic system was not substantively contested by the Landlord, but the testimony of the Landlord was vacant possession is required to effect the repair. No professional opinion was introduced as evidence to support this defence, nor at the date of the hearing had the Landlord given the Tenants an N13 notice to support this claim. The Landlord suggested that the basement may not be part of the rental unit. Such a distinction is in my view irrelevant as section 20 of the Act requires that the Landlord maintain the rental complex in a state that is fit for habitation. It is clear by the Landlord's own statements that this statutory requirement has not been met, despite having full knowledge of the problem prior to the commencement of the tenancy, and that in consequence the Tenants have had a significant impact on their use and enjoyment of the rental unit in consequence of a foul smell and potential health risk arising from the presence of sewage. From the testimony of both Mr. O'Grady and Mr. Bergeron, the septic system had not been repaired at the final hearing date. On the aggregate of the presented evidence, I find on a balance of probabilities that the state of the septic system is a breach of the Landlord's maintenance obligations under section 20 of the Act, and that the deficiency had a some impact on the Tenants' use and enjoyment of the rental unit.

34. In addition to the preceding issues, the following allegations were contained in the application but not raised in substance at the hearing by the Tenants or their representative. They have therefore not been considered:

    (a) no closet doors in two of three bedrooms and problematic door handles
    (b) Missing and damaged switch covers and receptacle covers throughout premises
    (c) Faulty windows and flooring in the upstairs bathroom
    (d) living room air conditioner inoperable and filled with mould
    (e) asbestos siding on 2nd floor requiring remediation

(f) rotten fascia and soffits need to be replaced, and proper gutters installed
(g) the parking lot was full of potholes and snow removal was deficient
(h) leaking pipes in the basement
(i) old windows in the basement that require replacement.

35. The Landlord asked that I make an adverse finding of credibility against Mr. O'Grady. I found Mr. O'Grady's testimony to be forthright and credible. His allegations were cogent and supported by photographic exhibits, many of which were taken early in the tenancy and support the Tenants' position that the maintenance issues are long-standing and have been present for substantially all of the tenancy. The Landlord's representative wishes me to draw an adverse finding of credibility based on isolated instances that I do not find undermine Mr. O'Grady's testimony in the aggregate. First, the Landlord's representative took issue with Mr. O'Grady referring to a hot water tank being at risk of explosion as being an unrealistic exaggeration. In the context in which the comment was offered, I accept that the statement was at most a figure of speech reflecting the dire state of the fixture. Furthermore, the Landlord's representative asserted during the hearing that Mr. O'Grady lied by purportedly contradicting his testimony about the time it took for a hot water heater to be repaired. The Landlord's representative indicated that he believed Mr. O'Grady had at first instance testified that the repair took five weeks, and corrected himself later to five days. I have listened to the recording and note that Mr. O'Grady's first answer was that the repair took five days. The allegation of inconsistent testimony on this point is without foundation.

36. The Landlord also takes the position that, even if there are maintenance obligations, the failure of the Tenants to pay rent for substantially all of the tenancy relieves the Landlord of its maintenance obligations.

37. In a conventional contract, the Landlord's position is not without merit. Payment of rent is, at common law, a fundamental covenant of a tenancy, and failure to do so may be treated at common law as a repudiation of the contract. Repudiation of a contract by one party affords the innocent party an election to be relieved of their performance obligations under the contract, and in conventional commercial leasing might entitle a landlord to certain self-help remedies arising from a breach.

38. The Act modifies common law remedies of contract and leasing in relation to residential leasehold estates. Self-help remedies of a landlord are largely abolished, and for nonpayment of rent a landlord must take its recourse within the Act, including the formalities codified by sections 59, 74, and others.

39. As the Act provides a complete code for addressing a tenant's failure to meet the covenant to pay the rent, the contractual remedies flowing from repudiation for nonpayment of rent must be seen as extinguished by statute. The Landlord cannot in my view rely on the principle of repudiated contracts that an innocent party may elect to be

relieved of their performance obligations under the contract, as the Act has codified the appropriate recourse.

40. The net effect is that a tenant's breach of a covenant to pay does not relieve the Landlord of other maintenance obligations as the contract is not at an end. I am aware of no case binding or persuasive upon me that recognizes impecuniosity as a defence to a landlord's maintenance obligations under the act. The Landlord's representative drew none to my attention. Even were there such a case allowing the Landlord to avail itself of such a defence, the Landlord has failed to provide any specific corroborating evidence of a state of impecuniosity beyond Mr. Ahmed's oral testimony.

41. The ultimate test to impose liability of the Landlord is for the Tenant to prove maintenance issues, and also prove that the issues were brought to the Landlord's attention and not remedied in a reasonable manner. The Landlord is free to rebut the Tenants' allegations of a failure to maintain, or else show that any response was reasonable.

42. As noted above, the Tenants have proven breaches of the Landlord's maintenance obligations. There is therefore no reason to question their integrity as a later fabrication,

and the absence of any meaningful rebuttal evidence by the Landlord is in itself fatal to any successful defence.

43. The Landlord's claim of proper maintenance is also undermined by a notice purporting to terminate the tenancy given on June 30, 2020. This notice is discussed later in relation to the T2 application, the contents of the notice are instructive. It reads in part as follows:

> This building needs to be vacated by the end of the month. Due to health, safety and environmental concerns made by tenants to the authorities.
>
> Numerous authorities are shutting the building down for health and environmental issues.

44. While the notice does not concede any specific maintenance issues, it is clear from its contents that the Landlord subjectively acknowledged by June 30, 2020 that the residential complex was in some state of disrepair.

45. The Landlord further alleges that the real substance of the application is that the Tenants cannot afford unit, and have brought the application as a means to evade rent. In the alternative, the Landlord alleged that the application is in retaliation for one of the Tenants not getting a repair contract with the Landlord. The Landlord further wished to draw attention to the Tenants' past housing history. Having considered the arguments advanced at the hearing, I consider all of them immaterial. As noted above, the Tenants have proven that the Landlord failed to maintain the rental unit and failed to address the issues in a reasonable manner. The Tenants' motives in bringing an application are irrelevant if the allegation for a failure to meet maintenance obligations is proven.

46. The Landlord has failed to rebut the maintenance allegations made and proven by the Tenants. Therefore, in accordance with the previous findings, I find that the Landlord failed to meet the Landlord's obligations under subsection 20(1) of the Act to repair and maintain the rental unit.

T6 Remedies

47. I find based on the aggregate of the foregoing that the Tenants have been significantly disrupted by the maintenance issues relating to the rental unit and residential complex. There is unquestionably a baseline of minor matters as noted above, but the Tenants have also had to contend with the inconvenience of a malfunctioning septic system, nearly useless bathroom, and general disrepair. This state of affairs has persisted substantially since the tenancy commenced. There has in the aggregate been a substantial impairment with their use and enjoyment of the premises.

48. The 100% abatement sought by the Tenants is in my view excessive. A complete abatement is merited only when there is a complete deprivation of utility of the rental unit,

including an inability to use it for storage. While significantly impaired, the rental unit remains substantially (albeit barely) weather-proof and utilities have been provided, except when withheld. The abatement for withholding of utilities is addressed in the T2 Application.

49. Having regard to the aggregate of the impact on the Tenants, I find that an abatement of 35% in rent from March 24, 2020 through to the rental period in which this order issues is an appropriate remedy. For the month of March 2020, the abatement is calculated on a per diem rate for eight days at $17.26 per day (i.e. [(1500 x 12 / 365) x 0.35]), therefore $138.08 for that month. The remaining months, an abatement of $525.00 per month is awarded.

50. Furthermore, the Tenants have sought an order under subsection 30(1) of the Act that the Landlord do specified repairs. The Tenants have specifically requested in the application that the Landlord be required to repair the septic system, hot water heater, flooring, bathroom, windows, and closet doors. The application also requests that the Landlord be ordered to comply with all outstanding municipal work orders.

51. Based upon the maintenance violations found above, I am satisfied that it is appropriate to order that the Landlord repair the septic system so that it operates in a good working order; the flooring in the kitchen, stairs, and upstairs such that it is secure and free from hazard; the bathroom such that the bathtub and shower operate in good working order; and windows to a state where they are weatherproof and secure.

52. Allegations relating to the hot water heater were not raised in the reasons for the application, and therefore no such order for repair will be given. In any event, this issue appears to have been remedied since the application was initiated. In addition, as noted above the closet doors were not raised at the hearing, therefore no order will be given for their repair, as a failure to maintain has not been made out.

T2 Application

53. The T2 Application, filed September 15, 2020, alleges two primary events: the disconnection of vital services and an irregular attempt to evict the Tenants. In addition to seeking a remedy for the Landlord withholding vital services, the Tenants also seek a remedy for allegations of harassment and substantial interference with their reasonable enjoyment of the property.

Vital Services

54. It is uncontested that vital services were withheld. Hydro was cut on September 14, 2020, and gas on September 22, 2020. These services were not restored prior to October 27, 2020. The testimony of Mr. Bergeron suggested that the restoration of vital services may have take place as late as November 2,2020, however October 27, 2020 was the date stated on the application.

55. Such conduct is proscribed by subsection 21(1) of the Act:

> A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed, withhold the reasonable supply of any vital service, care service or food that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfere with the reasonable supply of any vital service, care service or food.

56. While there was no tenancy agreement, the Tenants were not obliged to set up their own utility account, and for that reason I find on a balance of probabilities that hydro and gas were services that the Landlord was obliged to supply.

57. Vital services are defined in the Act as "hot or cold water, fuel, electricity, gas or, during the part of each year prescribed by the regulations, heat."

58. The Landlord believed it should not be held liable for any remedy, as it was the Landlord's position that the Tenants' failure to pay rent made the Landlord unable to pay utility accounts.

59. The Landlord presented no specific evidence of impecuniosity. Even were such evidence presented, it would have been moot, as the defence proposed by the Landlord is in my view barred by subsection 21(2) of the Act:

> For the purposes of subsection (1), a landlord shall be deemed to have withheld the reasonable supply of a vital service, care service or food if the landlord is obligated to pay another person for the vital service, care service or food, the landlord fails to pay the required amount and, as a result of the non-payment, the other person withholds the reasonable supply of the vital service, care service or food.

60. As noted previously in paragraph 2, the Landlord took the position that there was a flat rate supplement of $200 month for utilities. Even were this proven, such a state of affairs would not change the Landlord's obligations under section 21. The Tenants had no obligation to set up own utility account. The Landlord would therefore have been required to pay utilities to another person. The Landlord would remain liable for a withholding of vital services in the circumstances before me, even were there a flat fee paid by the Tenants.

61. I therefore find on a balance of probabilities that the Landlord was in breach of its obligation under section 21 of the Act.

62. Abatement: From the Tenants' testimony, I find that the withholding of vital services had an added and appreciable impact on the Tenants' use and enjoyment of the residential complex from September 14, 2020 to October 27, 2020, a period of 44 days. There was a further impairment of an already marginal rental unit, although the rental unit continued

to provide some basic shelter and there was therefore not a complete deprivation of what the Tenants had bargained for. For this period, I find a 4-day abatement of an additional 25%. In assessing this abatement, I have regard to the fact that the withholding of gas and hydro were of differing durations. At a rent of $1,500.00 per month, the per diem rate is (1500 x 12 /365 =) $49.31, therefore a total abatement of $542.41 is awarded.

63. I consider any investigation of the question of whether the withholding of vital services to constitute harassment or an interference with the Tenants' reasonable enjoyment to be moot, as the net abatement would be the same. The ultimate deprivation of use and enjoyment of the residential complex would remain unchanged, and no further abatement would be given.

64. Reasonable out-of-pocket expenses: The Tenants have claimed reasonable out-ofpocket expenses that the Tenants incurred because of the Landlord's withholding of vital services.

65. Generator: The Tenants claimed the cost of gas to operate a generator. Mr. O'Grady testified that the generator was necessary to keep the septic system from backing up, operate basic electrical, and that power was shared with other residents in the residential complex. From the Landlord's testimony, the residential complex comprised 11 additional units, of which eight were occupied. I accept that there is a nexus between the disconnection of vital services and the Tenants incurring a reasonable out-of-pocket expense for fuel to operate the generator. Nevertheless, the expenditure is not entirely as between Landlord and Tenants, as the stated testimony of Mr. O'Grady indicates that the also generator powered other units, creating a relationship between the Tenants and other tenants in the residential complex. Recovery of the expense incurred on behalf of these tenants is in my view properly between the Tenants and the other tenants in the complex. Only the expenses incurred by the Tenants on their own behalf in consequence of the Landlord's breach are in my view appropriately recovered in an application of this sort. As there was no metering to apportion the relative use of the gas, a straight-line apportionment of one-eighth to the Tenants is in my view appropriate.

66. The Tenants submitted a total of 56 receipts for gas dated between September 15, 2020 and October 27, 2022, totalling $1,467.75. One-eighth of this amount equals $183.47, and is awarded to the Tenants.

67. Firewood: Mr. O'Grady testified to needing firewood to heat the rental unit as a result of plunging temperatures. I accept his testimony as credible, and find that there was a reasonable out-of-pocket expense in procuring firewood as a result of the withholding of vital services. Two receipts dated between September 14, 2020 and October 27, 2020, totalling $180.80, were presented. This amount is awarded to the Tenants.

68. Food: The Tenants have also sought reimbursement of the cost of meals when vital services were withheld. Receipts submitted show expenditures for groceries, Tim Hortons takeaway, and meals ordered through online outlets. Despite providing

numerous receipts, the Tenants provided no base-line of comparable expenses in a similar period when they were not deprived of vital services. All the Tenants have shown is the amount she spent on food when the stove was awaiting replacement. Any difference from a typical baseline (which I would consider to be the quantification of damages) is therefore speculative. I am not prepared to award the cost of meals in these circumstances.

Irregular attempt at termination

69. On June 30, 2020, the Landlord delivered a letter requiring that the Tenants vacate the premises on the basis that the motel needed to be shut down for repairs. The Landlord later attempted to have police enforce this termination. The police refused to evict the Tenants. The Tenants wish to typify the act as harassment, or a substantial interference with their reasonable enjoyment.

70. An irregular attempt to terminate a tenancy is not in itself harassment. While "harassment" is not defined in the Act, the definition given in subsection 10(1) of the *Ontario Human Rights Code* has been widely accepted by the Board in interpreting allegations of harassment: "'harassment' means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."

71. The Tenants provided little testimony or supporting evidence in relation to this allegation. They referenced the irregular notice of termination, and an attempt by the Landlord to have the police remove them. The motives of the Landlord were not at all developed.

72. Furthermore, the subjective intention of the Landlord appears to have been that the rental unit was subject to the Act, and that such belief, given the nature of the rental unit within a motel, may not have been unreasonable. Order SOT-16853-20 issued on October 29, 2020 concluded the rental unit was subject to the Act.

73. With the lack of context of the Landlord's actions, and the potential for a reasonable belief that the rental unit was not subject to the Act, make a finding of harassment unsustainable.

74. Likewise, I do not find substantial interference to have been proven. There is simply inadequate development of the claim to support a finding that any interference with the Tenants' enjoyment of the premises was substantial.

Fine

75. The Tenants have sought an administrative fine against the Landlord in relation to the T2 application. As a T6 application does not allow a fine as a remedy, only the events alleged in the T2 may form part of this analysis.

76. While it is not binding upon me, the Board's Guideline 16 outlines relevant considerations in determining the appropriateness of an administrative fine:

> An administrative fine is a remedy to be used by the Board to encourage compliance with the Residential Tenancies Act, 2006 (the "RTA"), and to deter landlords from engaging in similar activity in the future. This remedy is not normally imposed unless a landlord has shown a blatant disregard for the RTA and other remedies will not provide adequate deterrence and compliance. Administrative fines and rent abatements serve different purposes. Unlike a fine, a rent abatement is intended to compensate a tenant for a contravention of a tenant's rights or a breach of the landlord's obligations.

77. Deterrence for egregious conduct, beyond whatever deterrent effect simple damages might provide, is an over-riding factor.

78. I am not convinced that the irregular attempt at eviction in June 2020 was sufficiently egregious to meet this test. Mr. Ahmed's testimony was that he was not represented at that time, and I accept his testimony as forthright and honest that he genuinely believed that the house was part of a motel, and therefore exempt from the Act. As I have previously found that the act did not constitute harassment or substantial interference, it would be improper to impose a fine on the circumstances.

79. The disconnection of vital services likewise merits a consideration of the overall circumstances before me. In the absence of sufficient proof that the disconnection was vexatious or harassing in nature, there is no evidence of egregious conduct by the Landlord that would suggest that an administrative fine is appropriate.

80. It is appropriate to comment again on the rent payment history at this juncture. The Landlord's testimony that he faced financial hardship from non-payment of rent, while not proven globally, remains a plausible explanation for the disconnection of the utilities. While, as discussed above, non-payment of rent does not excuse the Landlord from statutory obligations under the Act, it is equally true that withholding rent as a means of protest against claimed maintenance issues is not an appropriate recourse within the Act by a Tenant.

81. For these reasons, I do not consider a fine an appropriate in the circumstances.

Costs

82. The Tenants' representative sought costs be awarded based on the conduct of the Landlord's representative that she believed delayed the process. The grounds included inappropriate comments made by the Landlord's representative that had no relation to the application before the board. This conduct included baldly stating, after a witness had concluded their testimony, that they were involved in drugs, and later proceeding to ask if I would order a drug test against said witness after I indicated that I would not be

awarding award Board costs against the Landlord. Conduct of this sort, while problematic to an expeditious hearing, is perhaps better assessed in a broader context by a professional regulator, particularly in light of the comments below.

83. While I believe the conduct of the Landlord's representative may have drawn out the proceedings somewhat, I must have some regard to his comments about the language used in some testimony for the Tenants which I take to have been interpreted as (at the very least) microagressive, including describing both the Landlord and his non-relation acquaintances as "cousins". Having regard to a possible causal nexus between the conduct of the Tenants and the response of the Landlord's representative, I do not consider awarding costs to be appropriate.

Claims of bias

84. On numerous occasions after an adverse evidentiary or procedural ruling against him, the Landlord's representative stated his view that the Board was systemically biased against undefined equity-seeking groups. No evidence was introduced to substantiate these serious allegations, and the representative declined my invitation to make submissions on whether he believed there was a reasonable apprehension of bias in the proceedings. In accordance with *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851, a motion for recusal should be made to the adjudicator being asked to recuse himself or herself. No motion for recusal was ever put before me, despite my invitation.

Allocation of abatement

85. The circumstances of this matter give me some pause in how to award the abatement when the Tenants have not paid rent in some time. While the Tenants seem under the impression that the dismissal of the Landlord's arrears application in SOL-18270-20-RV extinguishes arrears prior to that order, I see nothing in that order or the Act that supports that proposition. As I am to infer from the comments of the Landlord's representative that an appeal or fresh L1 may proceed, I shall avoid making any express findings relating to the current quantum of arrears, except to note that it was uncontested that there were at the date of the final hearing arrears of at least the two months following the issuance of order SOL-18270-20-RV.

86. An abatement at its essence is a remedy to compensate a party for the delivered product being of lesser utility or substance than what was bargained for. When a good has not been paid for, for example when in a real estate transaction a purchaser successfully brings an action for specific performance with an abatement against an unwilling vendor, an abatement may be awarded as a reduction in amounts payable, rather than a direct order of payment.[1]

[1] See *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.,* 1997 CanLII 12181 (ON SC)

87. Simply put, it would be manifestly unfair and patently absurd to impose an abatement that obliges the Landlord to repay funds to the Tenants when rent was not actually paid. The abatement must therefore be structured as an offset against outstanding rent. The principle of a similar offset has been accepted by Divisional Court in *Marineland of Canada Inc. v. Olsen,* 2011 ONSC 6522 ("*Marineland*") at para 17*:*

> The Board was being asked to award compensation to the tenants for amounts that the landlord improperly retained. While the tenants were entitled to $3,000.00 in compensation because of the N13 Notice, the landlord was owed more than $3,000.00 by them at the time of their application. The amount owing for arrears of rent should have been taken into consideration in determining the amount of compensation owing. Had that been done, the Board would have had to conclude that the tenants were owed nothing in compensation at the time of the application because of the set-off.

88. Some scholarly commentary has queried the authority that the Board has to make such an offset[2], but in the current instance I consider the power inherent in allowing the Board to award an abatement: there ought to be no order to pay an abatement when the amount of rent paid is less than the remainder of rent payable after the abatement has been calculated. It was uncontested at the hearing that rent had not been paid to the Landlord since May 2020.

89. The disagreement over the effect of SOL-18270-20-RV further complicates the matter, as the position of the Tenants is that the rent due prior to April 30, 2022 was extinguished by the dismissal. Were that the case (and no finding is made on the validity of the Tenants' position, as a binding determination on the arrears was not before me), an abatement of rent for this period would be a ridiculous outcome, as effect would be an unjust enrichment: the Tenants would be both relieved of any rent obligations, ***and*** awarded a rebate against an extinguished payment obligation. Such an outcome would be contrary to the fundamental principles of the remedial nature of an abatement.

90. These factors place me in a position where I must not merely award the abatement as an offset against rent rather than cash payment, but also bifurcate that offset, given that the arrears prior to April 30, 2022 may (by the Tenants' interpretation) have been extinguished by order SOL-18270-20-RV.

91. Accordingly, the abatement of rent prior to April 30, 2022 must be conditional on the Tenants actually paying, or in future being obliged to pay that amount, and be offset against that contingency. This abatement runs from March 24, 2020 to April 30, 2022 and totals $13,263.08

[2] See Jack Fleming, *Ontario Landlord & Tenant Practice 2023*. Toronto: Lexis Nexis, 2023 at p. 276

92. The abatement for rent after that period must be offset against rent due (and/or paid) for the rental period commencing May 1, 2022.

93. While different remedial principles may be applicable in assessing reasonable-out-ofpocket expenses (the remedy ultimately being that restoration of incurred monetary damages, rather than a reduced price for a deficient delivery), I interpret *Marineland* as Divisional Court sanctioning the offset of such an award against amounts owing. The same principle in my view applies to the filing fee. The out-of-pocket expenses and filing fee awarded to the Tenants are therefore offset against outstanding rent for which the Tenants remain liable.

Funds paid into the Board

94. The funds paid to the Board in trust are ordered returned to the Tenants. There was never any authorization for these payments to be made, therefore they are ordered paid out. As this order makes no finding on arrears, it would in the circumstances be inappropriate to pay the funds to the Landlord in satisfaction of a possible obligation that is extrinsic to the matter before me.

It is ordered that:

1. A rent abatement is awarded to the Tenants as follows:

    a) For the period March 24, 2020, to April 30, 2022, the Landlord owes the Tenant a rent abatement of $13,263.08 for the Landlord's failure to maintain the rental unit. This amount shall be offset against any arrears of rent the Tenants owe the Landlord for these rental periods, for which the Tenants remain or shall be found liable.

    b) For the period September 14, 2020 to October 27, 2020 the Landlord owes the Tenants a rent abatement of $542.41 for the withholding of vital services. This amount shall be offset against any arrears of rent the Tenants owe the Landlord for these rental periods, for which the Tenants remain or shall be found liable.

    c) For the period May 1, 2022 to March 31, 2023, the Landlord owes the Tenants a rent abatement of $5,775.00 for the Landlord's failure to maintain the rental unit. This amount shall be offset against any arrears of rent the Tenants owe the Landlord for these rental periods.

2. The Landlord owes the Tenants their reasonable out-of-pocket expenses in the amount of $364.27. This amount shall be offset against any arrears of rent the Tenants owe the Landlord.

3. The Landlord shall repair the following by June 1, 2023:
    a) the septic system so that it operates in a good working order;
    b) the flooring in the kitchen, stairs, and upstairs such that it is secure and free from hazard;
    c) the bathroom such that the bathtub and shower operate in good working order; and,
    d) windows, to a state where they are weatherproof and secure.

4. If the Landlord does not do the repairs by June 1, 2023, the Tenants are authorized to arrange for the repairs to be done and may recover the cost of the repairs by deducting the amount from the rent paid in the months after the repairs are done until there is no longer any money owing.

5. The Tenants are entitled to recovery of their filing fees, being $45.00 in relation to the T6 Application and $48.00 in relation to the T2 application. This amount shall be offset against any arrears of rent the Tenants owe the Landlord.

6. The Board shall pay to the Tenants the amount of $2,780.00 together with any accrued interest.

March 16, 2023
Date Issued

_____
Ian Speers
Associate Chair, Landlord and Tenant Board

Southern-RO
119 King Street West, 6th Floor
Hamilton ON L8P4Y7

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

*Note: When the Board directs payment-out, the Canadian Imperial Bank of Commerce will issue a cheque to the appropriate party named in this notice. The cheque will be in the amount directed plus any interest accrued up to the date of the notice.